

The Honorable Benjamin H. Settle

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

JOHN WORTHINGTON,

Plaintiff,

v.

ROBERT M. GATES, in his official capacity as Secretary of Defense for the United States Department of Defense; CHRISTINE GREGOIRE, in her official capacity as Governor of the State of Washington; ROBERT M. MCKENNA, in his official capacity as Washington Attorney General; TIMOTHY J. LOWENBERG, in his official capacity as the Adjutant General of the Washington National Guard; and JERRY KOSIEROWSKI, in his official capacity as Counterdrug Coordinator for the Washington National Guard Counterdrug Task Force,

Defendants.

No. 3:10-cv-05222-BHS

COUNTERCLAIM OF STATE
DEFENDANTS CHRISTINE
GREGOIRE AND ROBERT M.
MCKENNA

Defendants, CHRISTINE GREGOIRE, in her official capacity as Governor of the State of Washington, and ROBERT M. MCKENNA, in his official capacity as Washington State Attorney General (State Defendants), aver as follows:

I. JURISDICTION AND VENUE

1.1 This Court has jurisdiction over this matter on the basis of federal question jurisdiction under 28 U.S.C. § 1331 and the Supremacy Clause of the United States Constitution. Further, supplemental jurisdiction exists under 28 U.S.C. § 1367.

1.2 Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) in that the plaintiff (who is the only “defendant” to this Counterclaim) resides in this judicial district and a substantial part of the events that gave rise to this claim occurred in this judicial district.

II. PARTIES

2.1 Defendant CHRISTINE GREGOIRE is the Governor of the State of Washington and the Commander-in-Chief of the militia of the State of Washington, RCW 38.08.020, and she brings this counterclaim in her official capacity.

2.2 Defendant ROBERT M. MCKENNA is the Attorney General of the State of Washington, and brings this counterclaim in his official capacity.

2.3 Plaintiff is a resident of Renton, King County, Washington.

III. FACTS

3.1 From December 4, 2007, to May 31, 2008, plaintiff submitted a number of requests under the Washington State Public Records Act, RCW 42.56 (PRA), to the Washington Military Department, an agency of Washington State, for records relating to the counter-drug activities of the Washington National Guard acting under 32 U.S.C. § 112.

3.2 The Washington Military Department was advised by the federal Judge Advocate assigned to advise the Washington National Guard on federal legal matters and other federal officials that the records requested were federal records because the Washington National Guard obtained or created these records while acting under Title 32 U.S.C. § 112. The Military Department was also advised that as federal records these records may be obtained only through a Freedom of Information Act request to an appropriate federal official.

3.3 In reliance upon this advice, the Washington Military Department responded to the plaintiff that it did not have any responsive state records and that the Washington National Guard may have responsive federal records that may be requested from the Judge Advocate pursuant to the FOIA.

3.4 The plaintiff brought an action under the PRA against the Washington Military Department in state court on or about June 9, 2008, to compel disclosure and to obtain penalties under the PRA. The state court action remains pending and has been continued pending the outcome of the motions currently before this Court.

IV. CAUSE OF ACTION DECLARATORY JUDGMENT

4.1 State Defendants seek a declaratory judgment pursuant to 28 U.S.C. § 2201, for the purpose of determining a federal legal question in actual controversy between the State Defendants and the plaintiff.

4.2 Based upon, but not limited to, all of the above allegations, State Defendants are entitled to a final judgment declaring the following:

i. When the Washington National Guard (WNG) is acting under 32 U.S.C. § 112, the Freedom of Information Act (5 U.S.C. § 552 (FOIA)) applies to the WNG.

ii. Under the Supremacy Clause of the United States Constitution, the FOIA preempts the application of the Washington State Public Records Act, RCW 42.56 (PRA), to records the WNG obtains, possesses, or creates when it acts under 32 U.S.C. § 112.

iii. The Washington Military Department did not act arbitrarily or capriciously in not producing the records plaintiff requested under the PRA, but informing the plaintiff such records may be requested under the FOIA.

V. REQUEST FOR RELIEF UNDER COUNTERCLAIM

State Defendants respectfully request that the Court grant the following relief:

a. Grant the declaratory judgment as set forth in 4.2.

1 b. Award Defendants Gregoire and McKenna their attorneys' fees and costs as
2 permitted by law; and

3 c. Grant such other relief as the Court deems just and equitable.

4 DATED this 9th day of February, 2011.

5 ROBERT M. MCKENNA
6 Attorney General

7
8 /s/ Brian Faller
9 BRIAN FALLER, WSBA No. 18508
10 Assistant Attorney General
11 Attorneys for Christine Gregoire and
12 Robert M. McKenna
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